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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. 993 69

AMERICAN STEVEDORES, INC.,

Petitioner,

*v.*

ROSARIO PORELLO

*and*

UNITED STATES OF AMERICA,

Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT OF PETITION

EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1945.

No. _____

AMERICAN STEVEDORES, INC.,

Petitioner,

*v.*

ROSARIO PORELLO

*and*

UNITED STATES OF AMERICA,

Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

American Stevedores, Inc., respectfully prays for a writ of certiorari to review a final order of the United States Circuit Court of Appeals for the Second Circuit, which modified the decree of the United States District Court for the Southern District of New York in favor of the libellant by (1) directing that the United States recover full indemnity from the petitioner and (2) by increasing the damages found by the District Court, and as so modified affirmed the decree.

Petitioner herein seeks a review by this Court of only so much of the determination of the Circuit Court of Appeals which held that there was jurisdiction of an action for personal injuries under the Public Vessels Act, which granted full indemnity from the petitioner to the United States and which held that, under the U. S. Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. Secs. 901, *et seq.*), the libellant was not precluded from instituting the present action.

## Statement of the Case

On September 23, 1942, the petitioner under a stevedoring contract with the United States (R. 22a), known as a "Warshipsteve" contract, was loading the Navy Transport "Thomas Stone", owned by the United States (R. 21a). Said transport was loaded with various supplies, military vehicles, and troops (R. 33a, 61a, 68a) and an army officer had been assigned to the vessel as troop transport quartermaster (R. 62a). One of petitioner's employees, Rosario Porello, while stowing cargo in the No. 1 hold of said vessel, was injured when a strongback or thwartship beam, together with several hatch covers, was caused to fall into the hold (R. 120).

The plans of this vessel called for a locking device to hold this strongback in place, but none was installed by the United States and, as the Circuit Court of Appeals found, no explanation for its absence was proffered by the United States (R. 121).

A military vehicle had been lowered into the hold of the vessel and had been landed upon the tank top preparatory to its being moved into a wing of the vessel's No. 1 hatch (R. 121). In order to move this vehicle, Di Mare, foreman of the hatch gang and an employee of the Petitioner, ordered the vehicle raised (R. 69a). After a repeat order, the vehicle was raised and in so doing it

came in contact with this strongback and unseated it, precipitating it and several hatch covers into the hold striking Porello (R. 70a, 71a, 121).

Porello brought an action on March 29, 1943, *in admiralty,* against the United States in the United States District Court for the Southern District of New York under the Public Vessels Act, 46 U. S. C. A. 781 (R. 112). The United States impleaded the petitioner under General Admiralty Rule 56 (R. 21a), alleging that, if any negligence be established, it was solely American Stevedores, Inc., who was negligent and that it had agreed under its "Warshipsteve" contract to "be responsible for injury to persons through the negligence or fault of the Stevedore, his employees and servants" (R. 22a).

Between the date of the accident, September 23, 1942, and July 30, 1943 (10 months), Porello received compensation benefits and medical attention aggregating $1,421.77 (R. 95a, 112). These payments were not made under an award but they were retained by Porello (R. 113, 95a). In fact, as appears from the foregoing, Porello accepted and retained compensation for two months after the institution of his suit against the shipowner (R. 108).

The Trial Court found, upon the evidence adduced, that the United States had been negligent in that the beam or strongback contained only one locking device and was therefore defective (R. 95a) and that the petitioner herein, having knowledge of that, had been negligent in the manner in which the cargo had been handled (R. 96a). For the concurrent negligence, as so found, the Trial Court decreed that the libellant fully recover against the United States, and that the United States of America have *contribution* from the petitioner herein for one-half so paid (R. 97a). A credit for the compensation benefits of $1,421.77 was allowed the petitioner

herein (R. 95a). The United States of America and the petitioner herein appealed from such final decree (R. 98a) and the libellant filed assignments of error respecting the inadequacy of the award of damages.

The Circuit Court of Appeals, in agreeing with the Trial Court, held the absence of the lock and Di Mare's negligent handling of the cargo operated concurrently in producing the resultant injury and that the petitioner and the United States of America were joint tort-feasors (R. 121, 122). However, the Circuit Court of Appeals held that contribution did not exist *in admiralty* in that there was not a common liability (R. 122). The Circuit Court of Appeals held there was jurisdiction under the Public Vessels Act (R. 120), increased the award to the libellant (R. 125), held that his capacity to sue had not been impaired by the acceptance and retention of compensation (R. 123), and that the United States of America was entitled to full indemnity under its "Warshipsteve" contract (R. 123). After the decision of the Circuit Court of Appeals, a Petition for Limited Rehearing was filed by the petitioner herein (R. 126) and the same was denied on January 31, 1946 (R. 137) with a *Per Curiam* opinion (R. 135). A motion to take additional testimony as to the intent of the parties to the indemnity provision in the "Warshipsteve" contract was thereafter filed (R. 138) and denied on February 19, 1946 (R. 146). This application for a writ of certiorari then followed.

## Jurisdiction

The jurisdiction of this Court to entertain this Petition and to grant the same is provided by Section 347 (a) of Title 28 of the United States Code and by Supreme Court Rule 38, par. 5(b).

## Questions Presented

1. Has the United States consented to be sued under The Public Vessels Act of 1925 for personal injury or death claims?

2. Is the United States, under its "Warshipsteve" agreement, used throughout the country, entitled to full indemnity from a contracting stevedore where the negligence of each concurred in causing injuries to the stevedore's employee?

3. Is there contribution in admiralty between a shipowner and a contracting stevedore since the enactment of the U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. §§ 901, *et seq.*?

4. Does contribution in admiralty depend upon a common liability or upon a common remedy?

5. Does an injured longshoreman, by the acceptance and retention of compensation benefits without an award, preclude himself from bringing any action against a third party under 33 U. S. C. A. § 933 (a)?

6. Are subdivisions (a) and (b) of § 933 of 33 U. S. C. A. to be read as an integrated whole?

7. Does admiralty have jurisdiction of an indemnity provision in a stevedoring contract?

## Opinions Below

The opinion of December 4, 1944 of the United States District Court for the Southern District of New York is not officially reported but appears at pages 92a-97a inclusive of the record. The opinion of January 10, 1946

of the Circuit Court of Appeals, 2nd Circuit, is not officially reported as yet but the same appears at pages 119-125 inclusive of the record. The *Per Curiam* opinion of the Circuit Court of Appeals of January 31, 1946, denying rehearing, appears at pages 135-136 of the record.

## Reasons Relied Upon for Allowance of the Writ

1. The decision of the Circuit Court of Appeals respecting the jurisdiction of the Court over a personal injury claim under the Public Vessels Act of 1925 (46 U. S. C. A. 781) placed reliance upon this Court's decision in *Canadian Aviator Ltd.* v. *United States,* 324 U. S. 215. The question here presented was not involved in the *Canadian Aviator* case. The question of a court's jurisdiction of a personal injury claim under the Public Vessels Act presents for the first time to this Court the construction of the word "damages", as used in the statute. In connection therewith the legislative history of the enactment shows that the word *damages* only contemplated *property* damage. Settlement of the judicial construction of this federal statute should come from this Court.

2. The decision of the Circuit Court of Appeals as to the interpretation of the "Warshipsteve" contract is in conflict with the decisions on the same question by the Circuit Court of Appeals for the First and Ninth Circuits.

*Weldon* v. *United States,* 65 F. (2d) 748 (C. C. A. 1);
*United States* v. *Wallace,* 18 F. (2d) 20 (C. C. A. 9).

The decision of the Circuit Court is clearly contrary to the language and rationale of various Circuit Courts in many cases, involving similar contracts, and with a prior decision of the Second Circuit as well as some state court decisions.

*Shamrock Towing Co.* v. *City of New York,* 16 F. (2d) 199 (C. C. A. 2);
*North American Ry. Const. Co.* v. *Cincinnati Traction Co.,* 172 F. 214 (C. C. A. 7);
*Southern Bell Tel. & Tel. Co.* v. *Mayor and Bd. of Alderman,* 74 F. (2d) 983 (C. C. A. 5);
*Thompson-Starrett Co.* v. *Otis Elevator Co.,* 271 N. Y. 36.

3. The decision of the Circuit Court of Appeals, as to the right of contribution in admiralty between shipowner and contracting stevedore, although left open in the *Per Curiam* opinion denying rehearing, involves an important question of Maritime Law, which has not been but should be settled by this Court. The rationale of the decision in the instant case is diametrically opposed to that enunciated 3 months prior thereto by the same Circuit Court in *Barbarino* v. *Stanhope S. S. Co.,* 151 F. (2d) 553.

4. The Circuit Court of Appeals has virtually lifted by its bootstraps a concept of contribution between joint tort feasors from another field of jurisprudence and has infused that principle into admiralty. In so doing, it has violated a fundamental precept of admiralty that "the right to contribution belongs to the substantive law of admiralty". Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.,* 218 U. S. 264, 31 S. Ct. 17. In reaching its conclusion, the Circuit Court, having nonetheless found that the petitioner and shipowner were joint tort feasors, overthrew the well established juristic philosophy in admiralty that the right to contribution is a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

5. The decision of the Circuit Court of Appeals as to the right of a longshoreman, having accepted and retained compensation without an award, to maintain an action

against a third party under 33 U. S. C. A. § 933(a) is an important question of federal law which has never been before this Court but should be settled by this court. This question has been before the District Courts on many occasions and the opinions of those courts are in conflict. The Circuit Court of Appeals has been presented with the question of *election of remedies* under § 933 (a) of Title 33 of the United States Code for the first time in the instant matter, and in resolving that question the Circuit Court has relied upon a lower court decision which stands opposed to the result reached by the Circuit Court of Appeals. In arriving at this result the Circuit Court has disregarded the intent of Congress and has engaged in "judicial legislation".

6. In holding that admiralty has jurisdiction of an indemnity provision in a stevedoring contract, the Circuit Court relied upon 28 U. S. C. A. § 41 (1) since the United States was the indemnitee. It therefore has applied to an admiralty action the character of the litigant as a test of jurisdiction, which is the test at common law or equity, by the very wording of the jurisdictional statute. In so holding it has disregarded the principle in admiralty that the subject matter of the contract must be maritime in nature in order that jurisdiction obtain. The decision, as rendered by the Circuit Court, stands opposed to the rationale of admiralty jurisdiction over contracts of indemnity, as enunciated by the same court in *The Wonder,* 79 F. (2d) 312. The decision of the Circuit Court stands opposed to the decision and views of this Court in *Armour & Co. v. Fort Morgan S. S. Co.,* 270 U. S. 253.

The interpretation of this "Warshipsteve" contract, used throughout the country, by the Circuit Court of Appeals is one which should be examined by this Court, and a determination made whether the various cases

hitherto decided are incorrect or whether the present decision is erroneous. If the interpretation is correct, then clarification should emanate from this Court so that the application of this decision by the many District Courts will not result in greater uncertainty. The scope and limits of its application should be enunciated by this Court so that uniformity of decision may be had in maritime causes of action. *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. By this decision, every contracting stevedore becomes the insurer, without a premium or benefit, of the negligence of the United States, as shipowner, or of any private shipowner, where similar or identical contracts are used. Further, where contracting stevedores formerly had coverage under their policies with casualty companies, they now stand uninsured by reason of the casualty companies' contentions that they do not cover liabilities contractually assumed by the contracting stevedores.

The instant case is intrinsically of public importance and is peculiarly appropriate for hearing by this Court as it is the first case in which this Court has been asked to decide the various questions presented. The various shipping interests, be they the injured longshoreman, the shipowners, the contracting stevedores or the underwriters of the liability of said stevedores under the *U. S. Longshoremen's and Harbor Workers' Compensation Act*, 33 U. S. C. A. §§ 901, *et seq.*, await the enunciation of the law by this Court.

We have recently emerged from a war during which all public vessels were owned by the United States and nearly all our merchant vessels were owned or operated by the United States Government, through the Administrator of the War Shipping Administration. Multitudinous personal injury actions are still pending against the United States by virtue of these operations. Many actions will hereafter be instituted against private ship-

owners wherein contracting stevedores will be impleaded. Shipping interests at large look to this Court for a delineation of their respective rights (R. 142). Wherefore, this case, it is respectfully submitted, merits the decision of this Court.

Respectfully submitted,

AMERICAN STEVEDORES, INC.,
Petitioner.

By EDWARD ASH,
SIDNEY A. SCHWARTZ,
Proctors for Petitioner.

## BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

### UNDER THE PUBLIC VESSELS ACT OF 1925, THE UNITED STATES HAS NOT CONSENTED TO BE SUED FOR PERSONAL INJURIES OR DEATH, AND THIS CONCLUSION IS BORNE OUT BY THE LEGISLATIVE HISTORY OF THE ENACTMENT.

In 1919 there were introduced in Congress two bills, known as S. 3076 and H. R. 7124. These bills were referred to the Committee on Judiciary. While they were in Committee, the Attorney General proposed a substitute bill. On November 13, 1919, there was a full hearing with respect to the latter bill. Passage of the bill of 1919 was urged by steamship operators and owners and not in any respect by persons interested in personal injury claims. (See Report 1301 of the House of Representatives, 66th Congress, 3rd Session, February 7, 1921). At page 43 of the report of the hearing the colloquy between Colonel Lee and Mr. Husted shows that *only* shipowners were being considered in the proposed bill. That the foregoing is true appears further from Mr. Igoe's statement at page 44 of said report. (Hearing of the House Committee on Judiciary, S. 3076 and H. R. 7124, November 13, 1919, 66th Congress, 1st Session). Apparently these bills did not get out of Committee.

On February 2, 1921, Mr. Husted introduced in the House a bill known as H. R. 15977, 60 *Cong. Rec.* 2478. The bill was referred to the Committee on Judiciary. The Committee reported on February 7, 1921 that this bill pass with certain amendments. 60 *Cong. Rec.* 2760. In its report (Report No. 1301, 66th Congress, 3rd Session, Feb. 7, 1921) the proponents of the legislation were steamship owners and operators. The bill's chief purpose, according to the Committee, was to grant "*private owners of vessels and of merchandise a right of action when their vessels or*

*goods have been damaged as the result of collision with Government-owned vessel * * *"*. No suggestion in the Report is to be found that the purpose of the bill embraces personal injury claims. Mr. Husted's bills H. R. 15977 and H. R. 6256, introduced in May 16, 1921, (61 *Cong. Rec.* 1492) were not passed. Instead, Congress on December 28, 1922 passed 2 statutes, which in application covered property damage up to a certain maximum amount (Report No. 913, House, 68th Congress, 1st Session, May 31, 1924). Thus, it will be seen that the Public Vessels Act, as originally conceived, embraced solely *property damage caused by collision.*

On February 14, 1924 Mr. Underhill introduced H. R. 6989 (65 *Cong. Rec.* 2474). This bill was referred to the Committee on Claims. 65 *Cong. Rec.* 2474. Mr. Edmonds, chairman of the Committee on Claims, on May 31, 1924 brought in H. Rep. No. 913, May 31, 1924, 68th Cong. 1st Sess.; 65 Cong. Rec. 10069. The report contained copies of correspondence between Mr. Edmonds and various cabinet members who recommended passage of H. R. 6989, which contained the phrase "damages caused by *collision* by a Public Vessel." Two days before submission of this report, Mr. Underhill introduced, as a substitute for bill H. R. 6989, bill H. R. 9535 which contained the phrase "for damages *caused* by a public vessel". The purpose of this substitute bill appears at pages 1 and 2 of Report No. 913, *supra.*

This substitute bill, H. R. 9535 became the Public Vessels Act on March 3, 1925. 66 *Cong. Rec.* 5530. The only change in H. R. 6989 and H. R. 9535 was the insertion of "damages *caused* by a public vessel" in place of "damages *caused by collision* by a public vessel".

Therefor, the question posed in the instant case is:

> Did Congress change the meaning of the word "damages" to embrace personal injury damages, by its elimination of the words "by collision", from the Public Vessels Act?

We think this must be answered in the negative. The petitioner contends that collision was eliminated as the sole cause for damage but that the nature or quality of damages was still confined to *property* damage, in contradistinction to personal injury damages. The same is gleaned from the Committee's Report No. 913, *supra*. At pages 14, 15 of said report the statement of Secretary Weeks shows that the *amount* of the *property* claims was thereby extended in admiralty, in distinction to the settlement of small claims under the two statutes of December 28, 1922, *supra*. From the various Reports, *supra*, it will be seen that H. R. 15977 introduced in 1921, H. R. 6989, introduced in 1924, and its substitute H. R. 9535, which became the Public Vessels Act, were all shipowners' bills, and were designed for property damage solely. The sponsor of H. R. 9535 stated on the floor of the house (66 *Cong. Rec.* 2087):

> "The bill I have introduced simply allows suits in admiralty to be brought by owners of vessels *whose property has been damaged by collision or other fault* of Government vessels and Government agents." (Italics supplied.)

The colloquy between Mr. Upshaw, Mr. MacLafferty and Mr. Underhill, the sponsor of The Public Vessels Act, at pages 2087 and 2088 of 66 *Cong. Rec.*, shows quite clearly that there was evidenced concern for personal injury claims but that the same was not the subject of the Public Vessels Act but would be looked into by Mr. Underhill at some future time.

When bill H. R. 9535 was before the Senate, the attention of the Senators was called to S. Rep. No. 941, 68th Congress, 2nd Session, which was a copy of House Report No. 913, *supra*. Senator Bayard, in whose charge H. R. 9535 was placed, referred to the colloquy of Mr. Underhill, Upshaw and MacLafferty as to personal injury claims. 66 *Cong. Rec.* 4310.

H. R. 9075, which was an act to amend the Suits in Admiralty Act of 1920 to make the latter applicable to all public vessels, was pending before the Congress at the very time the Public Vessels Act was passed. Hearings on H. R. 9075 were had before the Judiciary Committee and thereat many prominent members of the admiralty bar appeared to urge its passage. Judge Hough's remarks that the United States should consent to make itself liable for personal injuries and death by the amendment of the Suits in Admiralty Act were made clear to the Committee. Notwithstanding, H. R. 9075 was discarded and H. R. 9535, sponsored by Mr. Underhill, who had stated to Congress that it related solely to property damage, was passed.

The history of unsuccessful attempts to pass legislation providing a remedy against the United States for personal injuries caused by public vessels is briefly as follows:

In 1926, H. R. 8651 was introduced in the House. 67 *Cong. Rec.* 3071. Section 8 (3) provided explicitly that property damage covered by the Public Vessels Act was excluded. No reference is made therein to personal injuries, from which it is therefore inferable that personal injuries were not covered by the Public Vessels Act. Senate bill S. 1912 was considered by the House in conjunction with H. R. 8651. It amended S. 1912 to conform to H. R. 8651. 67 *Cong. Rec.* 11086, 11099 to 11111. As so amended it was passed by the House. It was not repassed by the Senate.

On January 13, 1928, H. R. 9285 was introduced by Mr. Underhill. 69 *Cong. Rec.* 1468. It excluded by Section 4(3) property damage arising under the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925. Again, a recognition that the Public Vessels Act did not embrace personal injury claims. Bill H. R. 9285 was referred to the Committee on Claims. The debate in the House on January 30, 1928 shows Mr. Underhill restating

that the Public Vessels Act only embraced property damage. 69 *Cong. Rec.* 2184. This bill received a pocket veto by the President, although passed in both the Senate and the House. 70 *Cong. Rec.* 5217, 5220 and 5230.

Private bills have been passed to allow relief to personal injury claimants. As recently as 1937, Congress, by virtue of 2 private enactments, awarded damages to various persons injured by reason of the negligence of a public vessel. See, *An Act for the relief of Edna M. Callahan and Anna Scott,* 50 Statutes At Large, Part 2, page 927; *An Act for the relief of Margaret Grace and Alice Shriner,* 50 Statutes At Large, Part 2, page 992; House Report No. 33, 75th Congress, 1st Sess.; House Report No. 322, 75th Congress, 1st Sess. If the Public Vessels Act had provided a remedy for personal injuries, the Committee on Claims by virtue of Rule 15 of the Rules of the House Committee on Claims, would have been precluded from considering such claims. It therefor follows that by its own construction of its legislation Congress holds that the Public Vessels Act does not embrace personal injury cases.

The question whether the Public Vessels Act embraces personal injury *damages* has not been decided by any court. In *O'Neal* v. *United States,* 11 F. (2d) 869, aff'd 11 F. (2d) 871, Judge Campbell, although stating the purpose of the Act (p. 870), decided the case on the theory that an employee of the United States was not given any rights under this statute against the United States, his employer. This theory compelled the Circuit Court of Appeals, 2nd Circuit, to conclude that a naval officer could not recover for the unseaworthiness of a submarine in *Dobson* v. *United States,* 27 F. (2d) 807. The question raised in the instant case was left open in the cited case, as appears from the statement at page 808 of said case:

> "Appellee, on the other hand, argues that the statute should be construed as limiting recovery to dam-

> ages to property and not contemplating compensation for loss of life. We do not find it necessary to determine this question in the present case."

The question here raised was not before the Court in *Bradey* v. *United States*, 151 F. (2d) 742.

In *Canadian Aviator Ltd.* v. *United States*, 324 U. S. 215, this Court traced the legislative history of the statute here involved and settled the controversy as to whether the phrase "damages *caused* by a public vessel" meant "damages caused by *collision*" only. This Court there did not consider whether the term "damage" meant "property damage" solely or embraced personal injury damage. The following statement, appearing at page 218 of 324 U. S. shows that this Court had in mind that the Public Vessels Act was a bill for the relief of shipowners:

> "The Public Vessels Act, 1925, was the last in a series of statutes directed generally at affording private *vessel-owners* an adequate and efficient remedy for damages arising from negligent operation of ships owned by the United States." (Italics supplied.)

Under the rule of law requiring strict construction of statutes waiving sovereign immunity (*United States* v. *Sherwood*, 312 U. S. 584; *Eastern Transportation Company* v. *United States*, 272 U. S. 675) and under the legislative history, *supra*, a court has no jurisdiction of a cause of action for personal injuries under the Public Vessels Act.

Assuming, arguendo, that there were jurisdiction under this Act, is the United States entitled to full indemnity from a contracting stevedore under its "Warshipsteve" contract where the negligence of the United States has concurred with that of the contracting stevedore to cause injury to the stevedore's employee?

## A CONTRACTING STEVEDORE IS NOT AN INDEMNITOR OR INSURER OF A SHIPOWNER'S NEGLIGENCE, ABSENT UNEQUIVOCAL OR CLEAR LANGUAGE TO THAT EFFECT IN THE STEVEDORING CONTRACT.

The law on the subject of the responsibility of contracting stevedore to shipowner under a stevedoring contract has hitherto been enunciated by the Circuit Court of Appeals for the 9th Circuit in *United States* v. *Wallace*, 18 F. (2d) 20, and by the Circuit Court of Appeals for the 1st Circuit in *Weldon* v. *United States*, 65 F. (2d) 748. In concluding that the provision for indemnity in this "Warshipsteve" contract entitled the United States, shipowner, to full indemnity, the Circuit Court of Appeals reiterated the rationale of the *Wallace* case, *supra*, yet arrived at a diametrically opposed result. This, despite the rule of thumb in the *Wallace* case (18 F. (2d) 21):

> "As is pointed out in Perry v. Payne, supra, *we should not, in the absence of language free from all doubt,* conclude that the parties intended the contractor should assume an obligation which, for a single act of negligence on the part of the owner, or of one of its employés, over whom the contractor had no restraint or control, would not only wipe out all profit, but would exceed the total consideration for the job." (Italics supplied.)

The *result* of the *Wallace* case becomes indeed salient by virtue of the fact that the Court there was interpreting a United States Shipping Board contract, which incorporated an indemnity clause similar to the instant one, and in the cited case the United States, shipowner, was held solely at fault.

In *Weldon* v. *United States*, 65 F. (2d) 748, the Circuit Court of Appeals, 1st Circuit, was confronted with the construction and interpretation of a United States

Shipping Board Merchant Fleet Corporation contract, which contained a *similar indemnity clause* (p. 749 of 65 F. (2d) middle of right hand column—Compare indemnity clause in instant matter at p. 22a of Record). In construing this contract, the Court in the cited case said (65 F. (2d) at p. 749):

> "It would be *extraordinary* to impose upon a stevedore liability for the negligence of a shipowner with respect to permanent structures on the ship, over which the stevedore has no duty of maintenance and no control whatever. * * * The intent of the contract obviously is that the stevedore shall carry insurance to protect its obligations to its employees and to the general public, in case of accidents arising out of its work. *If it had been intended that the stevedore should also carry insurance protecting the owner of the vessel against claims for negligence based on defects in its permanent structures, it cannot be doubted that the contract would have said so.*" (Italics supplied.)

Yet the very judicial result which would be extraordinary to the Circuit Court of Appeals, 1st Circuit, becomes the reasonable pattern of interpretation for the Circuit Court of Appeals, 2nd Circuit. This irreconcilable conflict becomes the warp and woof of this petition.

In refuting the argument of the petitioner that this "Warshipsteve" contract should be interpreted so that complete indemnity could only be had if the contracting stevedore were solely negligent, the Circuit Court said (R. 122):

> "The stevedore's agreement to carry compensation insurance forbids that construction, because, having insured, it would not be liable to the person injured."

The same is palpably erroneous in that the person injured might very well not be the stevedore's employee in which event it certainly would be liable. Furthermore, if it were impleaded by the shipowner, as it was here, in a

suit instituted by the stevedore's employee, and there were a finding that it was the active or primary tort feasor, it certainly would be liable to the injured person, circuitously though if he be its employee. These considerations of active-passive negligence are not before this Court as the Circuit Court of Appeals has concurred with the District Court that the petitioner and the United States were joint tort feasors (R. 122). Bypassed completely is any discussion of active and passive negligence, primary and secondary liability, and indeed the finding that the parties hereto were joint tort feasors, which to our mind means wrongdoers *in pari delicto,* militates against any consideration of active and passive negligence.

Various Circuit Courts and other tribunals have characterized the terms or language of a contract which warrant the judicial interpretation that a contractor or indemnitor will indemnify another contractor for the latter's negligence.

To accomplish that result the Circuit Court of Appeals, 7th Circuit, in *North American Ry. Const. Co.* v. *Cincinnati Traction Co.*, 172 F. 214, said *clear* language must be utilized. The Circuit Court of Appeals, 5th Circuit, in *Southern Bell Telephone & Telegraph Co.* v. *Mayor and Board of Aldermen*, 74 F. (2d) 983, said such a result required *unequivocal* terms. The Circuit Court of Appeals, 4th Circuit, in *Washington & Berkeley Bridge Co.* v. *Pennsylvania Steel Co.*, 215 F. 32, 34, said:

> "The presumption is exceedingly strong against an undertaking by any one except an indemnity company to be responsible for the negligent acts of another."

In *United States* v. *Wallace et al., supra,* the Circuit Court of Appeals, 9th Circuit, said (18 F. (2d) at p. 21):

> "* * * it is but reasonable to require that an obligation so extraordinary and harsh should be expressed in *clear and unequivocal* terms." (Italics supplied.)

The rule governing the construction of contracts in New York State has been expressed by its Court of Appeals in *Thompson-Starrett Co.* v. *Otis Elevator Co.*, 271 N. Y. 36, 41, as follows:

> "It is a general rule long established that contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in *unequivocal* terms." (Italics supplied.)

To same effect, 31 *Corpus Juris*, page 431.

The construction of the Circuit Court here has, at present writing, already permeated many pending cases resulting in the defense of various actions having been returned to the various assureds by their P. & I. underwriters on the ground that an assured is not covered for liabilities assumed by contract.

If it were the intention of a contracting stevedore to indemnify a shipowner for the latter's negligence, either sole or concurrent with that of the stevedore, the "Warshipsteve" contract would have provided, as the contract did in *Kokusai Kisen Kabushiki Kaisha* v. *Columbia Stevedoring Co. Inc.*, 23 F. Supp. 403, aff'd 100 F. (2d) 1016 (C. C. A. 2), that indemnity was to be had for damages "for which either or both of the parties hereto may or shall be liable." *A priori*, no such result was ever intended by stevedores to the "Warshipsteve" contract (R. 142).

In attempting to distinguish the instant contractual interpretation from that of the same court in *Shamrock Towing Co.* v. *City of New York*, 16 F. (2d) 199, the Court rested its distinction on the theory that a charterer was liable to an owner without any fault on his part. Of course, a charterer is only cast in damages for its negligence and a presumption of negligence exists where the scow, bailed in good condition, is returned in a damaged state. *C. F. Harms Co.* v. *Turner Const. Co.*, 3 F. (2d) 591 (C. C. A. 2). In the *Shamrock* case, the impleaded respondent (the case being in admiralty) was only held liable for half-damages

by this Circuit Court since the respondent was liable for its share of negligence, despite the indemnity clause there (Quoted at R. 130) which is similar in scope to the instant one. The attempted distinction by the Circuit Court is a distinction without a difference.

By judicial emasculation the Circuit Court has injected uncertainty and discord into maritime matters, where formerly uniformity existed.

That the determination of this problem is of prime importance to the shipping industry appears more fully from the statement in the affidavit of the Chairman of the Stevedoring Committee of the Maritime Association of the Port of New York. The same is set forth *in extenso*, since paraphrasing might be impertinence (R. 142, 143):

> "The opinion referred to is of particular importance not only to the Jarka Corporation of which I am the President, but, in my opinion, to all those engaged in Stevedoring operations, as all Stevedores working under U. S. Army Transport contracts had substantially the same indemnity clause.
>
> "If the liability imposed upon Stevedores as set forth in the opinion referred to is to remain unchanged, it will, in my opinion impose upon them an obligation not contemplated by them or the Government at the time they entered into the Army agreements which incorporate the indemnity clause above quoted."

## THE U. S. LONGSHOREMEN'S AND HARBOR WORKER'S COMPENSATION ACT (33 U. S. C. A. §§ 901 *ET SEQ.*) HAS NOT CHANGED THE RULE OF CONTRIBUTION BETWEEN JOINT TORT FEASORS IN ADMIRALTY.

Prior to the passage of the U. S. Longshoremen's and Harbor Workers' Compensation Act in 1927, c. 509, § 1, 44 Stat. 1424, 33 U. S. C. A. §§ 901 *et seq.*, it was the fundamental tenet of admiralty that "the right to con-

tribution belongs to the substantive law of admiralty. It is not a mere inc ..nt of a form of procedure." Mr. Justice Holmes in *Lehigh Valley R. R. Co.* v. *Cornell Steamboat Co.*, 218 U. S. 364, 31 S. Ct. 17. The right to contribution was a consequence of the joint tort. *Benedict on Admiralty* (6th Ed.), Vol. 2, § 353, page 553.

As late as October 1945 (3 months before the decision in the instant case), the Circuit Court of Appeals, 2nd Circuit, per Circuit Judge Learned Hand, had before it in *Barbarino* v. *Standope S. S. Co.*, 151 F. (2d) 553, the question as to whether an impleading petition in admiralty should have been dismissed by the trial court where the parties were identically situated, to wit, injured longshoremen suing the shipowner who had impleaded the contracting stevedore, employer of the injured longshoreman. In the cited case the court appreciated that the shipowner had a very real interest to hold in the stevedore impleaded in order to obtain contribution. The Court there said (151 F. 2d) 555):

> "* * * Whether that would be enough interest to support an appeal we need not decide, *because the suit is in the admiralty where contribution between joint tort feasors has existed since 1875.* The Alabama, 92 U. S. 695, 23 L. Ed. 763. The consequence of that right is that the shipowner has a very real interest in holding the stevedore liable." (Italics supplied.)

In holding in the case at bar that contribution does not lie *in admiralty* between shipowner and contracting stevedore as joint tort feasors, the Court virtually lifted by its bootstraps a concept of contribution from another field of jurisprudence and infused it into the maritime law. In so doing, reliance was placed upon *Consolidated Coach Corp.* v. *Burge*, 245 Ky. 631 and *Walker-Kroger Grocery & Baking Co.*, 214 Wisc. 519, which were actions *at law* involving automobiles in which local statutes were con-

strued. Premising its conclusion upon the fact that a statutory immunity existed in favor of a contracting stevedore from suit by an injured employee under the Longshore Act, the Court has violated the *ratio decidendi* of this Court in such cases as *The Chattahoochee*, 173 U. S. 540 and *Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394.

Remedially, an injured longshoreman is relegated to compensation as against his employer. Nevertheless, the right to contribution between joint tort feasors *in admiralty* does not depend upon a common remedy *to the party injured.* "It (contribution) is dependent upon the admiralty doctrine that *the burden of injuries resulting from common fault shall be equally borne by those responsible.*" *Davis* v. *Molyneaux*, 7 F. (2d) 172, 173. Thus, it will be seen that under the Harter Act, 46 U. S. C. A. §§ 190 *et seq.*, the carrying vessel is immune by statute for damage to its cargo due to errors of navigation. Yet, the non-carrying vessel, found mutually at fault with the carrying vessel, recovers from the carrying vessel one-half of the damages, paid or to be paid to the carrying vessel's cargo, although the carrying vessel could not be sued directly by the cargo owner. *The Chattahoochee, supra; Aktieselskabet Cuzco* v. *The Sucarseco, supra.*

Analogies respecting contribution attempted to be drawn from sources other than admiralty are without persuasive force. With due deference to the Circuit Court, it is respectfully submitted that the rationale of *The Tampico*, 45 F. Supp. 174 and *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, properly enunciates the law between shipowner and contracting stevedore since the enactment of the Longshore Act.

As was said in *The Tampico*, 45 F. Supp. 174, 175, where the shipowner, Hedger, who had been sued *in admiralty* by the injured longshoreman, impleaded the stevedore, Nicholson, from whom it sought contribution:

"The libellant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libellant's injuries, to the full extent of his damages. The Hamilton, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. *Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force.* The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (citation) Whatever its origin, the admiralty rule in this country is well known to be the other way. (citations) . . . Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450."

. . . . . .

"The immunity given Nicholson (stevedore) by the statute from suits arising out of libellant's (longshoreman's) injuries furnishes no defense against Hedger's (shipowner's) claim to contribution as between joint tort-feasors." (Italics supplied.)

In *Rederii* v. *Jarka Corp.*, 26 F. Supp. 304, appeal dismissed 110 F. (2d) 234, a shipowner in an independent admiralty action sought indemnity or contribution from the contracting stevedore for payments made to respondent's employee. The Court there said (p. 305 of 26 F. Supp.):

"If the longshoreman's right of action against the vessel was not taken away by the Act, he can libel the vessel as before, *and an owner of the vessel who is obliged to pay damages has the same rights and remedies against other persons as he had before the Act was passed.*" (Italics supplied.)

The petitioner is cognizant of Mr. Justice Frankfurter's statement in his concurring opinion in *Republic of Mexico* v. *Hoffman*, 324 U. S. 37, 39, that

"Adjudication should not borrow trouble by worrying about a case not calling for decision."

In line with such statement, it may be entirely consonant for this Court to leave unresolved the question of contribution *in admiralty* between shipowner and contracting stevedores, who had been held to be joint tort feasors. However that may be, the desideratum, oft expressed by this Court, that there be uniformity of decision in the Maritime Law, invites the attention and consideration of this Court.

## A LONGSHOREMAN, HAVING ACCEPTED AND RETAINED COMPENSATION BENEFITS WITHOUT AN AWARD, HAS THEREBY ELECTED TO EXCLUSIVELY PURSUE HIS RIGHTS UNDER THE U. S. LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT AND SUCH WAS THE INTENT OF CONGRESS.

In limine, it must be appreciated that there certainly must be a serious question respecting the interpretation of § 933 (a) and (b) of 33 U. S. C. A. for the plethora of irreconcilable decisions to result, as presently exists. Determination is here sought of a judicial construction of subdivision (a) of § 933 of 33 U. S. C. A. and whether that subdivision has a meaning, separate and distinct from subdivision (b) of the same section. The same is not a matter of esoteric discussion.

It is the petitioner's contention that if a longshoreman's cause of action against a third party, after he has accepted compensation without an award, be suspended in mid-air or be within the "twilight zone" of the law, the cure-all is to come from the Congress. For judicial tribunals to embark and continue on a course of conduct, as they have done, is to recognize that they are indulging in "judicial legislation". This was appreciated by this very

Circuit Court in *Toomey* v. *Waterman S. S. Corp.*, 123 F. (2d) 718, 721, where it said:

> "It may be that it is more just to allow an employee to resort to both remedies than to have acceptance of compensation either with or without an award operate to divest his cause of action. *That, however, was a consideration for the law-making body.* In any event the chance for constant differences over an employee's understanding of his legal rights which is involved in the interpretation of the act sought by the plaintiff is far from desirable. *It would seem better that an employee who has accepted compensation should either lose his individual right to sue third parties or should retain both rights.* If he knows he is getting compensation, as he plainly did here, that in our opinion was enough." (Italics supplied.)

The Federal statute was modeled upon the New York State Workmen's Compensation Law as it existed in 1927. *Hunt* v. *Bank Line*, 35 F. (2d) 136 (C. C. A. 4); *The Employers' Liability Assurance Corporation Ltd.* v. *Monahan*, 91 F. (2d) 130 (C. C. A. 1). However, in 1937 subdivision (1) of Sec. 29 of the New York State Workmen's Compensation Act was amended so as to provide that an injured employee "need not elect whether to take compensation under this chapter or to pursue his remedy against such other, but may take such compensation and * * * pursue his remedy against such other subject to the provisions of this section." The very next year, 1938, the Congress amended only subdivision (b) of § 933 of 33 U. S. C. A. so that an assignment of the cause of action against the third person was effected only where an award was made. Subdivision (a) of § 933 was left intact. The purpose of this amendment to subdivision (b) of section 933 is gleaned from *Report No. 1945 of the House of Representatives, 75th Congress, Third Session*, dated March 14, 1938. So much of that report as deals with the amend-

ment of Section 933 (referred to as Section 33 in the report) reads as follows (p. 9 of said report):

> "The purpose of this amendment is to remove possible cause of complaint regarding the operation of the provision in subdivision (b) of section 33 in making the mere acceptance of compensation work automatically an assignment to the employer of all rights of action against the third party tort feasor. Acceptance of compensation without knowledge of the effect upon such rights may work grave injustice. The assignment of this right of action against the third party might properly be contingent upon the acceptance of compensation under an award in a compensation order issued by the deputy commissioner, thus giving opportunity to the injured person or to the beneficiaries in the case of death, to consider the acceptance of compensation from the employer with the resulting loss of right to bring suit in damages against the third party, or a refusal of compensation so as to pursue the remedy against the third party alleged to be liable for the injury. In the proposed amendment the final clause of the present wording of this subdivision has been omitted as unnecessary. *This amendment follows the New York workmen's compensation law, which contains a provision that the 'awarding' of compensation shall operate as an assignment of the cause of action.*" (Italics supplied.)

It is patent that no reference is made to the 1937 amendment, *ante*, of the N. Y. State Workmen's Compensation Act. Surely, if Congress had intended by its 1938 amendment of subdivision (b) of § 933 of 33 U. S. C. A. to give the injured employee the right to simultaneously take compensation and also to sue a third party wrongdoer, it would have and could have so provided in conformity with the previous year's amendment of the New York State Workmen's Compensation Law. Is it not significant that the House of Representatives in the foregoing report only referred to the fact that it "follows the New York Workmen's Compensation Law, which contains a provision that

the 'awarding' of compensation shall operate as an assignment of the cause of action"? *Sequitur* that the provision for election under subdivision (a) exists separate and apart from the question of assignment under subdivision (b). In this connection, the statement of the Supreme Court of New Jersey in *Ross* v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported), is apposite (at pp. 734-735 of 1943 American Maritime Cases):

> "The subsequent amendment of subsection (b) of sec. 933 does not limit the scope or effect of the foregoing pronouncement. The only effect of the amendment was to postpone the transfer of the title to the cause of action against a third party until there has been an actual award of compensation under the Act. *The requirement for an election under subsection (a) was not changed by the amendment, nor deferred until such time as an actual award of compensation has been made. To hold otherwise would be, in effect, judicial legislation, and frustrate the evident intent of sec. 933 as a whole,* by permitting an injured employee to follow two remedies with the possibility of a double recovery in the event that the employer is content not to apply for an award." (Italics supplied.)

The Court in the *Ross* decision, *supra*, answered the contention that the third party, shipowner, may not avail itself of the situation by saying (p. 736):

> "* * * The defendant may avail himself of this as a defense, not because he has been or will be prejudiced by such conduct, *but because the plaintiff has relinquished the right to pursue his common law remedy against the defendant in order to avail himself of the remedy set up by the statute,* thus effecting a legal waiver, i. e. the voluntary relinquishment of a known right." (Italics supplied.)

The Circuit Court in the instant case did not give careful consideration to this all-important question of *election*

*of remedy* under the Longshore Act. The foregoing statement is buttressed by the fact that as authority for its holding that an injured longshoreman's capacity to sue is not impaired by his acceptance and retention of compensation, it cited the *Ross* case, *supra*. The holding in the *Ross* case stands opposed to the result in the case at bar.

This is indeed the very first case that has been presented to any Circuit Court squarely on the question of *election*. The same Circuit Court had before it *Grasso* v. *Lorentzen*, 149 F. (2d) 127 on April 9, 1945. A reading of that case will show unqualifiedly that the pleadings and decision concerned themselves with the *assignment* question under subdivision (b) of § 933.

The question of election has been before the District Courts on many occasions and a heterogeneity of decision has resulted. Holding that there is no impairment to sue a third party upon the acceptance and retention of compensation without an award, are:

*Iaria* v. *Silver Line*, 56 F. Supp. 42;
*Cupo* v. *Isthmian S. S. Co.*, 56 F. Supp. 45;
*Brusich* v. *Grace Line*, 56 F. Supp. 48;
*Sessa* v. *Weeks Stevedoring Co.*, 56 F. Supp. 50;
*Grasso* v. *Lorentzen*, 56 F. Supp. 51, aff'd 149 F. (2d) 127 (distinction noted, *supra*);
*Tartaglio* v. *Cunard White Star Line*, 56 F. Supp. 55.

Contra:

*Ross* v. *C. D. Mallory Corp.*, 1943 American Maritime Cases 729 (not officially reported);
*Bellantuono* v. *American Export Lines, Inc.*, 1944 American Maritime Cases 437 (not officially reported).

In *Bellantuono* v. *American Export Lines, Inc., supra,* the District Court followed the yardstick enunciated by the Circuit Court of Appeals, 2nd Circuit, in *Toomey* v. *Waterman S. S. Corporation,* 123 F. (2d) 718, that a conscious exercise of an election to take compensation precludes a third party action.

The New York Court of Appeals in *Ricciardi* v. *American Export Lines,* 294 N. Y. 812, affirming 268 App. Div. 606, has recently answered two questions certified by the Appellate Division, Supreme Court, 2nd Department. By its answers, the New York State Courts now follow those decisions of the District Courts which allow the prosecution of a third party action, after acceptance and retention of compensation without an award. In so doing, they are following the well established principle that federal court interpretation of a federal Act are imperative authorities for a state court. By so doing, they are following a trail of confusion as the District Courts are in disagreement with one another.

A stevedoring firm makes no voluntary payments to its injured longshoremen. The characterization of such payments as voluntary, as has been indulged by the Circuit Court, misconceives or overlooks the compulsion under which a stevedore pays compensation. *33 U. S. C. A. § 914 subd. a.* A stevedore cannot with impunity controvert a longshoreman's claim for compensation. Yet, it better had controvert every claim, for as the situation stands today, it steers its course in a maritime industry, sitting in a cockpit of confusion. Only by controverting every claim, with a possible resultant penalty therefor, can a stevedore or its compensation carrier be certain that its maximum liability will be $7,500, as provided by *§ 914 (m) of 33 U. S. C. A.*

The hardship and inequality of the protection to a stevedore under the Longshore Act is shown by the follow-

ing typical case. The longshoreman, having accepted compensation without an award, sues the shipowner in negligence and the shipowner impleads the stevedore under the contract of indemnity, *supra*. The compensation carrier or liability underwriter then returns the defense of the suit to the stevedore on the grounds that the stevedore may be held liable by virtue of its assumption by contract of the indemnification of the shipowner for the latter's negligence, as found by the Circuit Court in the instant case. Coverage is not afforded for assumed obligations. Recovery is then had by the longshoreman, whose capacity to sue has been held to be unimpaired, and the shipowner, on its contract of indemnity, despite its own negligence, recovers fully from the stevedore, who can look to no one for recoupment. The maximum liability of $7,500 under the Longshore Act fades into nothingness for oftentimes the recovery is very substantial. Certainly the result to the stevedore is harsh and anomalous.

No statement is more appropriate in closing upon this feature of the law than that, transplanted here, of Robinson in 44 *Harvard Law Review* 223, 257:

> "Enough is shown, however, to indicate the need for a thoroughgoing congressional re-survey of the entire field. It should seek to harmonize the law with itself and upon the central theme that the human and social problems of all the sufferers are the same. Whether they are workers in the maritime industry or its patrons affords in itself no distinction of value. In behalf of the patrons, historic survivals should be examined to ascertain their present justification."

## THE CHARACTER OF A LITIGANT DOES NOT GIVE ADMIRALTY JURISDICTION OF THE NON-MARITIME FEATURES OF A CONTRACT.

There is a lack of clarity on the jurisdiction of admiralty respecting contracts partly maritime and partly non-maritime. *Robinson on Admiralty,* page 186. The fact that the United States is the indemnitee, so-called, under a contract, does not *ipso facto* confer jurisdiction in admiralty. That the same is true is supported by the very wording of Section 24, as amended, of the Judicial Code, 28 U. S. C. A. § 41, in contradiction to the interpretation of the Circuit Court of Appeals (R. 136). Under subdivision (1) of § 41 of 28 U. S. C. A. jurisdiction is conferred upon the district courts "of all suits of a civil nature, *at common law or equity,* brought by the United States". Subdivision (3) of § 41 of 28 U. S. C. A. confers jurisdiction of all civil causes of admiralty and maritime jurisdiction. It is not the character of the litigant that confers jurisdiction in admiralty but rather the cause of action or nature thereof. For as was said by Frederic Cunningham in 18 *Harvard Law Review* 294:

> "It surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the Courts undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. * * * It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction, makes it somewhat difficult to keep the two systems separate."

The indemnity portion of the "Warshipsteve" contract is non-maritime. Therefor, if judicial surgery were

performed upon this contract, as suggested by Circuit Judge Learned Hand in *Compagnie Francaise de Navigation A. Vapeur* v. *Bonnasse,* 19 F. (2d) 777, certiorari denied, *sub. nom., American Exchange Irving Trust Co.* v. *Bonasse,* 275 U. S. 551, 48 S. Ct. 114, the provisions of indemnity in the "Warshipsteve" contract comprise that part of the contract, which is non-maritime. Mr. Justice Brandeis' views in *Armour & Co.* v. *Fort Morgan S. S. Co.,* 270 U. S. 253, 46 S. Ct. 212, were that the contract must be "wholly maritime" for admiralty to have jurisdiction. Further, if exact precedent be necessary for a determination that admiralty does not possess inherent jurisdiction over a contract of indemnity, as is contained within the "Warshipsteve" contract, the Circuit Court needed but to resort to its own case of *The Wonder,* 79 F. (2d) 312, wherein Circuit Judge Augustus N. Hand said (79 F. (2d) at pp. 313, 314):

> "The original contract between the city and E. O. Roberts Company, Inc., provided that the contractor 'should be responsible for all injuries to persons or damage to prope ty either directly or indirectly that may result fron his operations for which otherwise the City of New York might be liable'. *The trial court held the city solely liable, and properly refused to enforce the contract to save the latter harmless for the reason that the obligation was not maritime and therefore did not come within the jurisdiction of a court of admiralty.*" (Italics supplied.)

Cases of maritime or non-maritime contracts have nurtured hair-splitting distinctions. 25 *Mich. L. Rev.* 289; 40 *Harvard L. Rev.* 1148; 41 *id.* 792. If certainty and uniformity of decision is the touchstone in admiralty, this Court should be the mason.

By this decision, diversity and confusion has been substituted for uniformity, which is the essence of admiralty jurisdiction. *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 40 S. Ct. 438.

The decision of the Circuit Court of Appeals not only renders ineffectual the protection of the U. S. Longshoremen's and Harbor Workers' Compensation Act to the contracting stevedore, but also relegates the contracting stevedore to the position of unlimited and complete insurer for the negligence of the shipowner.

WHEREFORE, it is respectfully submitted that this case is one calling for the granting of a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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